8-6-1976

Bob Chaffin, doing business as Bob Chaffin & Sons Construction Company v. The Security Central National Bank of Portsmouth, Ohio

Reply Brief (P) 1975-SC-0876

REPLY BRIEF (P)

3595

SUPREME COURT OF KENTUCKY

FILE No. 75-876

BOB CHAFFIN, Doing Business as
BOB CHAFFIN & SONS
CONSTRUCTION COMPANY, - - - - *Appellant*

Vs:

THE SECURITY CENTRAL NATIONAL
BANK OF PORTSMOUTH, OHIO - - - *Appellee*

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE OSCAR SAMMONS, *Judge*
20th Judicial District

APPELLEE'S RESPONSE TO APPELLANT'S PETITION FOR REHEARING

CHARLES M. DANIELS
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Attorney for Appellee

This is to certify that a true copy of the within Appellee's response to Appellant's Petition for Rehearing has been served upon Honorable John R. McGinnis, Attorney at Law, Braden Building, Greenup, Kentucky 41144, Attorney for Appellant, and Honorable Oscar Sammons, Judge of the Greenup Circuit Court, Greenup, Kentucky 41144, in the manner provided by CR 5.02 and as required by RCA 1.250, this 5 day of August, 1976.

Charles M. Daniels
Counsel for Appellee

FILED
AUG 6 1976
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STATEMENT OF THE QUESTION PRESENTED

The Court did not err in its opinion of June 25, 1976, by overlooking relative facts or failing to apply the applicable law in sustaining the Judgment of the Greenup Circuit Court wherein Summary Judgment was granted the Appellee herein.

SUPREME COURT OF KENTUCKY

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BOB CHAFFIN, Doing Business as
BOB CHAFFIN & SONS
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Vs:

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

A. A STATEMENT OF THE NATURE OF THE PROCEEDINGS.

This Court rendered an opinion in this action on June 25, 1976, affirming the Judgment of the Greenup Circut Court wherein a Summary Judgment was granted the Appellee herein which set aside conveyances made by the Appellant, Bob Chaffin, to his Son and Daughter as an attempt to defraud creditors.

The Appellant has filed a Petition for rehearing, and this is the Appellee's Response thereto.

ARGUMENT

THIS COURT DID NOT ERR IN ITS OPINION OF JUNE 25, 1976, BY OVERLOOKING RELATIVE FACTS OR FAILING TO APPLY THE APPLICABLE LAW IN SUSTAINING THE JUDGMENT OF THE GREENUP CIRCUIT COURT WHEREIN SUMMARY JUDGMENT WAS GRANTED THE APPELLEE HEREIN.

The Appellant is now contending that this Court has overlooked relevant facts and failed to apply the applicable law to this case.

The Appellant also stated that this Court has assumed that a trial has been held in this case, and that this Court had overlooked the fact that a Summary Judgment had been entered and states that the case of *Ashby* v. *Marsh,* Ky.. 412 S.W. 2d 853 (1967), is not in point.

The Marsh case cites other cases as authority, which, of course, cite still other cases as authority.

One of the cases cited in the Marsh case is *Cochran's Adm'x.,* et al v. *Cochran,* et al Ky., 115 S.W. 2d 376. This was a case wherein depositions were taken on cross-examination to set aside a Deed where there were badges of fraud, and the witnesses, upon advice of Counsel, refused to answer the questions, and the Court said that the burden was cast upon the recipients of the property to show the good faith and regularity of the transaction, and the case held as follows:

"It is a well-settled rule that, where the evidence tends to prove a material fact, which imposes liability upon a party who has it within his power to produce evidence of facts as they existed, and he neglects or refuses to offer such proof, the natural conclusion is that, if produced, instead of rebutting, it would support the inference against him and support the case of his adversary. When conduct apparently suspicious or dishonorable is the subject of investigation and an actor has opportunity to explain it and interest in doing so yet fails or refuses, the effect of the rule is so much the stronger. Moore on Facts & 574. The Defendants' silence weighs heavily against them. Their refusals argue their culpability."

In the case of *Guthrie,* et al, v. *Foster,* et al, Ky., 76 S.W. 2d 927, which was a case to establish a partnership, depositions were taken as if on cross-examination of the Defendant, and, on advice of his Counsel, he refused to answer the questions concerning transactions relative to the partnership, and the Court stated as follows:

"He was thus afforded the privilege and opportunity to avail himself of his own testimony which he declined to accept; consequently, the Court must determine the decisive questions herein without the enlightening and helpful benefit of his testimony. His refusal to answer the question and thereby impart to the Court his personal knowledge of the decisive facts is a circumstance from which it is allowed to be inferred that, if he had answered the question, his answer would have established a partnership between him and Foster."

And the Court upheld the rule of the Trial Court that there was a partnership.

The application of the above principle in these cases was obviously applied, because of the Defendant's failure to answer questions at the taking of depositions as if on cross-examination.

It is common knowledge that there is no Trial Judge present, nor is one necessary, at the taking of discovery depositions. Appellant's argument to the contrary has no merit.

The Appellant's argument that this Court has assumed that a trial had been held in this case is, upon it's face, shown to be without merit, because the first line in this Court's opinion, rendered on June 25, 1976, states that this was an appeal from a Summary Judgment.

In the instant case, the Appellee, as the Movant for Summary Judgment, established the apparent nonexistence of a genuine issue of material fact, and it then became incumbent upon the Appellant to counter by showing some form of evidenciary material. *Neal, Adm'r.,* v. *Welker,* Ky., 426 S.W. 2d 476; *Hayes* v. *Rodgers,* Ky., 447 S.W. 2d 597.

The burden of proof being on the Appellant to explain the circumstances surrounding the execution of the Deeds and the failure of the Appellant to answer the questions propounded by Appellee's Counsel concerning the facts surrounding the execution of the Deeds, which would be vital and germane to the Appellant's sustaining the burden of proof, constitutes a complete lack on the part of the Appellant to sustain the

same, and the Appellant's refusal to testify on these matters gives rise to the presumption that his testimony would have been unfavorable to the Appellant.

The Appellant in the present case voluntarily and upon advice of Counsel placed himself in a position to have a Summary Judgment rendered against him, and it was not incumbent upon him, the Appellee, to make him by Court Order produce his evidence to sustain his burden of proof.

The Appellant has made no showing that this Court has overlooked relevant facts or failed to apply the applicable law, because it cannot be assumed that this Court thought that a trial had been held in this case when the Court's opinion was directly to the contrary, and it is obvious that the Court has applied the applicable law. The appellant has certainly not cited any law to the contrary.

CONCLUSION

The Court was correct in its opinion of June 25, 1976, in affirming the Judgment of the Greenup Circuit Court granting Summary Judgment to the Appellee. The Appellant has failed to show that this Court has overlooked relevant facts or failed to apply the applicable law, and his Petition for rehearing should be denied.

Respectfully submitted,

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